Canadian Mining-Law.

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A Paper Read before the American Institute of Mining Engineers, at the Wilkes-Barre Meeting, June, 1911.

AUTHOR'S EDITION.

1911.

SUBJECT TO REVISION.

[TRANSACTIONS OF THE AMERICAN INSTITUTE OF MINING ENGINEERS.]

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FOR some years past, those interested in the development of the increasingly important mining industry of Canada, have urged the adoption by the Dominion Parliament of a federal mining-law, which would have the force and stability of statutory enactment. At present, placer-mining in the Yukon Territory, is governed by the Yukon Placer Mining Act. All other mining under federal jurisdiction is governed by Orders in Council and Ministerial Regulations.

In the earlier stages of development, it is perhaps a matter of necessity that these important matters should be so dealt with; but it is now felt that the time has come when mining-rights in the extensive regions under federal control should be put on a permanent basis, and that any changes required from time to time should be made only after full and open discussion in Parliament.

A short sketch will suffice to indicate how vast and varied the interests affected really are.

When the Dominion of Canada was constituted by the Imperial Statute known as the British North America Act of 1867 (which came into force by proclamation on July 1 of that year), it comprised only the present Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick; but provision was made for the inclusion of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land, and the North West Territories. Subsequently Rupert's Land and the North West Territories were acquired, the Crown Colonies of British Columbia and

* SECRETARY'S NOTE.—Mr. Clark, an eminent Canadian lawyer, and joint author of the treatise on "The Law of Mines in Canada," has been requested by the Dominion Government to prepare a Federal mining-law, and presents this paper, by invitation of the Council, in order to obtain, if possible, useful suggestions from members of the Institute.—R. W. R.

Prince Edward Island were admitted, and all the other British Territories and possessions in North America, with the islands adjacent thereto, except Newfoundland and its dependencies, were annexed to Canada by Great Britain.

Canada, consequently, now comprises the whole of the northern half of North America, except Alaska, Newfoundland, and that portion of Labrador which constitutes a dependency of Newfoundland. All lands, mines, minerals, and royalties belonging at the time of the union to the several Provinces of Canada (now Ontario and Quebec), Nova Scotia, and New Brunswick, are declared to belong to that one of the said several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situated or have their legal origin—subject, however, to any trusts existing in respect thereof, or any interest therein, other than that of the Province.

Each of the Provinces named has jurisdiction to make laws for the management and sale of its public lands, and of the timber-wood thereon, and also as to property and civil rights in the Province.

With some exceptions, not necessary to be here specified, the same rules were made applicable to Prince Edward Island and British Columbia. But very different conditions and regulations obtain in the remaining parts of Canada.

Under the sanction of an Imperial Statute, the Dominion of Canada obtained a surrender of the lands and territories granted by Charles II. in 1670 to the Governor and Company of Adventurers Trading into Hudson Bay, known as the Hudson Bay Co.; and Rupert's Land and the North West Territory were consequently admitted into the Dominion as of July 15, 1870.

When the Provinces of Manitoba, Saskatchewan, and Alberta were formed, the lands, mines, and minerals, with slight exceptions, were not transferred to the Provinces, but remained the property of the Dominion of Canada, and subject to federal jurisdiction and control.

The proposed federal mining-law must deal with the mines and minerals of these three Provinces, of all the Territories (including the Yukon Territory), and of certain areas of the older Provinces, principally the Indian lands and the Railway belts of British Columbia. It must, therefore, deal with placer-

mining, coal, natural gas, oil, petroleum, gold, silver, copper, and the other minerals. The whole field must be covered and every problem of mining-law solved.

The framing of this general law is regarded by mining-men as supremely important, not only on account of the great interests actually and potentially involved, but also because it is looked upon as the first step towards the unification of the mining-laws of Canada. The vital importance of such completeness, wisdom, and practical convenience being presented by the federal statute as will recommend it to the several Provinces for voluntary adoption is therefore self-evident.

While the Dominion has no jurisdiction over the mining-laws of the Provinces which own mining-lands, it is hoped that the provisions of the federal law, by reason of their excellence and efficiency, will gradually be adopted by the various Provinces.

To paraphrase a famous saying, this must take place, not by reason of imperial power, but by the imperial power of reason.

In this connection, a striking instance of concerted action by independent jurisdictions may be mentioned. Some years ago, an exceedingly well-drawn Act, dealing with bills of exchange and promissory notes, was passed by the Imperial Parliament. The same Act, with slight changes, was passed by the Canadian Parliament, and by a majority of the State legislatures of the United States; so that it may now be said that this statute governs the greater part of the English-speaking world!

There is no reason why the members of this Institute should not take a useful and active part in obtaining for the mining world advantages similar to those which have been thus secured by the mercantile communities of Great Britain, the United States, and Canada.

At the present time, a discussion of the fundamental principles upon which such a mining-law as is proposed should be based, and of the merits and deficiencies of such codes as that of Mexico, would be interesting and instructive, as bringing together, in useful form, the results of close observation and varied experience of the mining-laws of the world.

There is no danger that any form of the so-called "apex-law" will be again introducted into Canada. That law was once copied, under the influence of miners from the Pacific

States, by British Columbia, but was finally abolished April 23, 1892, since which date the rights of the holder of a mineral claim are confined, in British Columbia, as in all other parts of Canada, to the ground bounded by vertical planes drawn through its surface boundary-lines. The vested rights of claim-owners who had located their claims under former acts were protected; and the "apex-law," in British Columbia, as elsewhere, has given rise to costly litigation, which seems inherent in the system of extra-lateral rights.

There are, however, other important questions to be discussed: such as how adequately to protect the prospector, without at the same time introducing the danger of "blanketing;" the function of discovery in the acquisition of mining-title; the most useful forms of working-conditions, and the most efficient methods of enforcing such regulations. Last, but not least, the ever-present and ever-troublesome questions of taxation and royalties must be considered.

Discussion.

Rossiter W. Raymond, New York, N. Y.:—It is satisfactory, but not surprising, to learn that there is no danger of the adoption in Canada of the apex-law with its extralateral right. I do not think that any community which has once experienced the evils of that system, and has escaped from them by abandoning it, would ever dream of returning to it. And British Columbia having had that experience, has doubtless furnished a sufficient object-lesson for the whole Dominion.

Mr. Clark's hope that a federal law may be framed which will ultimately be adopted by the Provinces, is not chimerical. Not only the commercial instance which he cites, but the history of our United States law, encourages such a hope. That law prescribes a few conditions, leaving to local legislation freedom to ordain others, not inconsistent therewith. For instance, the form and the maximum dimensions of a mining-claim and the minimum amount of annual "assessment-work," are prescribed, together with a few forms of procedure; but smaller dimensions, larger amounts of annual work by possessory owners, and additional forms of procedure, may be imposed by local legislation or regulation. In many cases,

especially during the earlier period following the adoption of the Federal law (1870), this freedom was abundantly used, and locators of lodes or placers were often obliged to do, for the maintenance of their possessory titles, a good deal more than the U. S. statutes required; but gradually the convenience of uniform conditions, working quietly, but continuously, like the pressure of gravity, had its effect; and, at the present time, the local regulations of mining-districts have been largely superseded by State or Territorial statutes, which are, in the main, not only consistent, but identical with those of the federal law. Another illustration is the manner of making and recording a mining-location upon the public domain. It may seem strange that the U. S. law prescribes nothing at all in this respect. It required the location to have certain essential features of shape, maximum dimensions, and relations to the discovery of a mineral deposit within its boundaries; but it does not require any particular form of record or proof of these fundamental requirements. Indeed, the United States government does not to-day possess either records or maps showing what portions of its public mineral lands have been appropriated by valid mining-locations, and, being held under possessory title, do not now belong to that domain. The explanation of this anomaly is historical. At the time when our government had to do something in order to define its relations with miners who were technical trespassers upon the public lands, those lands constituted, in the main, a vast unsurveyed wilderness. A theoretically perfect and properly guarded system for the record of mining-titles would have been impracticable of execution; and Congress, therefore, did the best it could under the circumstances. The punishment of trespassers being neither desirable nor practicable, it legalized the trespass, and left the parties concerned to settle their relations to one another according to the local rules which they had themselves adopted in the several mining-districts, or which might be established for them by local legislatures, subject to a few more or less elastic requirements established by the United States, as the real owner of the land. Meanwhile, the facts concerned were left to be proved by any kind of evidence, documentary or oral.

In my judgment, this action of Congress, though warranted under the circumstances so far as records of location, etc.,

were concerned, might and could have been remedied, when these circumstances had greatly changed, by requiring records of location, etc., to be made in or officially transmitted to the U. S. local or General land-office. But it is worthy of note that, without any such requirement, the effect of simple considerations of the certainty and safety of such records has brought about a general uniformity of local legislation, requiring them to be filed with the officers of courts or counties, who will be responsible for their preservation from mutilation or destruction. It is not yet the duty of such officials to give notice to the United States of such entries, affecting the title of the United States to its public lands; but that step may easily be taken. Meanwhile, this narrative of somewhat chaotic progress may encourage the belief that obviously wise and useful features of administration will, in the end, be adopted by communities upon which, when first promulgated, they are not legally binding. In other words, it is worth while for a federal government, like that of the U. S. or the Dominion of Canada, to frame a system of mining-law for its own lands, which will commend the acceptance of its constituent States or Provinces in the administration of their own lands.

To this end, I think the first requisite is a survey of such lands. Apart from the mischievous extra-lateral right, the greatest cause of confusion and waste in those mining-districts of this country which have been afflicted by our mineral-land law, has been the lack of such public surveys as would permit the accurate definition of a mining-location by reference to established landmarks. I do not know how far the Dominion has proceeded in the discharge of this public duty—one of the very first, in my opinion, which is incumbent upon any government worthy of the name. At all events, I hope that Mr. Clark's draft of a code will include provision for immediate performance of this work. Mining-grants may have to be made in territory not yet surveyed; but this should be done under conditions which will secure their subsequent re-definition by reference to the lines of such a survey, and will permit the readjustment of their boundaries so as to conform, if possible, to those lines. This will be comparatively easy, if the boundaries of the original location be required to follow the direction of the future survey-lines—*e.g.*, to run N–S. and E–W. The

purchaser or possessory tenant of a tract of mining-land would never object to paying for a little more area here, or a little less there, in order to conform to this obviously convenient rule—provided, of course, he were not haunted by the fear of losing problematical "apex-rights" by any variation in his lines. Under our present U. S. system, the locator determines, as well as he can, the course of the "apex," which he fondly hopes he has truly discovered, and is bound to claim a rectangle covering that course—under penalty of losing some or all rights, both extralateral and intralateral, if later developments should prove him mistaken. It might be a hardship to him to be required to draw his boundary-lines in particular directions; although I am inclined to think that, in the long run and in the majority of cases, the result would be advantageous to our mining-operators, by reason of their greater security of title. I have had to do with a large number of mining-litigations, and I can recall few lode-claims involved in such cases from which the lode did not depart, at some point, across a side-line; so that I am inclined to believe that, even under the "apex-law," the boundaries of locations might have been required (with some modification or conditions as to length and width), to run N–S. and E–W., with real advantage to locator. Be this as it may, I see nothing to prevent the adoption by the Dominion of Canada of a provision so well-established and so universally approved in the sale of public agricultural lands.

Next in importance to public surveys is the official classification of the public lands to be leased, sold, or opened to prospectors. This classification should be, in my opinion, final and conclusive. If the land in question has been sold outright, say, at the price of agricultural land, and the grant or patent of the government, conveying the full common-law fee simple to its contents, *usque ad astra, usque ad inferos*, has been issued to the purchaser, then the original official classification of it, as agricultural, should not be disturbed by proceedings attacking the purchaser's title, on the ground that it was or is, in fact, more valuable for mining than for agricultural purposes. The government should occupy, in this respect, precisely the position of a private seller. (Of course, actual fraud, to which the purchaser was a party, might be pleaded against his title, but

to no further extent and under no other conditions by the government than by any private party wronged by such fraud. That is to say, the government should itself bring suit for the abrogation of its grant or deed; and the latter should not be open to collateral attack in any private suit.) In short, the purchaser of anything from the government is entitled, in justice as well as policy, to know just what he gets, and to be assured that he really gets it. The danger that, through an incorrect official classification, mineral land may be sold at a lower price as agricultural land, is entirely insignificant compared with the importance of giving a clear and secure title to purchasers.

On the other hand, lands may be granted for agricultural purposes, with a reservation by the government of the mineral rights. In this case, a previous official classification is less important. Yet I think it might well be required to protect the government against unnecessary administrative complications. Any land which is officially classed as "mineral," had better not be sold as "agricultural;" and, in any case it is best that in such transactions, as in private bargains, both parties should clearly know what they are doing. In leases of mineral rights, it might be urged that the government should be able to increase its requirements upon proof of unexpected value of the property. One obvious answer is, that such a change should be practicable, if at all, only after a term of years. But a more conclusive answer is, that the mining industry should be taxed upon its annual product or profits; and such a tax will take care of all unexpected prosperity, without disturbing the conditions of mining-title. I feel bound to say, however, that nearly 50 years of observation and experience have inclined me to believe that the acquisition by private parties or corporations of the full fee simple of public lands, including the mineral right, is better in the long run, than any system of leasing by the government. If such a system should be deemed advisable, then the condition of the retention of title should be, not a given amount of annual "work," but an annual payment of money. The requirement of "assessment-work," under our U. S. law, is delusive and useless. The required annual payment of a sum of money would be much more effective in preventing the

retention of possessory titles (which are practically, under our law, government leases) for speculative purposes.

The policy of requiring continued work as a condition of continued possessory tenure is not particularly harmful with regard to metal-mines, especially when, as with us, the amount of such work is trivial; but the governmental leasing of coal-lands for limited periods, and upon conditions of continual operation under penalty of forfeiture, is thoroughly bad. This idea has been suggested, I believe, by President Taft himself, whose sane and wise views of the general subject of "conservation" have won the approval of intelligent people. But I think he is wrong on this point. The operation of a colliery by a lessee is certain to cause the sacrifice of future to present interests; and the requirement that such a lessee shall keep going or lose his lease simply aggravates the situation. No governmental inspector could fairly require of a lessee the expenditure of a large sum of money which he might never recover, under an arrangement subject at any time to executive cancellation, especially if such expenditure were required, not for the safety of workmen, but only for the advantage of some future lessee; and the requirement of continuous operation as a condition of tenancy, would operate to favor that over-production which is the greatest enemy of "conservation." At a recent meeting of the Institute, an eminent authority on this subject[1] read a paper advocating the shutting-down by the government of coal-mines that did not pay, in order to prevent the injurious over-production and consequent waste of coal. My proposition is, that such mines will be shut down by their proprietors without governmental interference, provided they are not forced to continue operations for some other reason, such as the danger of thereby losing their property altogether. In short, I think that, in all such questions, private ownership and liberty are likely to produce better results than governmental supervision; and that the best thing any government can do is to preserve order, enforce contracts, give to lessees or purchasers of its lands clear and valid titles, and then allow them the largest practicable liberty of enterprise and industry—

[1] Edward W. Parker, The Conservation of Coal in the United States, *Trans.*, xl., 601 (1910).

reaping its own advantages, not from the extortion of a percentage of the anticipated results of speculative adventures, but from the consequent increased wealth of all its people and the fair taxation of that wealth.

I could say many other things upon the text which Mr. Clark has presented, but I trust the foregoing will incite other members of the Institute to offer suggestions which may be useful in his undertaking.